Supreme Court, U. S.
FILED
JUL 23 1980
MICHAEL RODAK, JR., CLERK

No. 80-106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAICI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Government asserted an estate tax against the estate of Adriana Bosurgi, mother of Leone and Emilio Bosurgi, who died in 1963. The fund in suit (approximately $400,000) which the Government is seizing under the default here directed against SAICI, came into being under a judgment in favor of SAICI secured in the New York Supreme Court in 1973 in a common law fraud and conversion action against the Chemical Bank to which neither the Government nor the estate of Adriana Bosurgi were parties. Nor was the custodian account in the name of Adriana Bosurgi from which the Government's estate tax claim allegedly arose, involved in the State Court litigation.

1. Did the Court of Appeals err,

contrary to the holding of the Court in Commissioner v. Bosch, 387 US 456 (1967), when it failed to give "proper regard" to the State Court judgment under which SAICI was entitled to the fund in question?

2. Did the Court of Appeals err, contrary to the full faith and credit clause of the Constitution, when it failed to give respect to the State Court judgment under which SAICI was entitled to the fund in question?

3. Did the Court of Appeals err, contrary to the due process clause, when it deprived SAICI of a trial or hearing in the District Court to establish the validity and the force and effect of its State Court judgment?

4. Did the Court of Appeals err, contrary to the full faith and credit

clause of the Constitution, the due process clause, and the opinion of this Court in Commissioner v. Bosch, 387 US 456 (1967), when it permitted the District Court to strike the answer of SAICI, which answer asserted SAICI's reliance upon the State Court judgment holding it entitled to the fund in question, and enter a default against SAICI in favor of the Government solely because of SAICI's inability to comply with every discovery demand of the Government in its tax foreclosure action as against the fund in question, with respect to taxes owed by another?

5. Did the Court of Appeals err, contrary to the holdings of this court in Blonder-Tongue v. University Foundation, 402 U.S. 313 (1971) and Parklane Hosiery Company v. Shore, 439 U.S. 322

(1979) when it failed to apply the doctrine of non-mutual collateral estoppel against the Government, after the Government participated informally and effectively in the State Court proceedings, against the position advanced by SAICI, but declined the invitation of the State Courts to participate as amicus, and refused to intervene as a party?

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

SAICI*, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 1, 1980 (Docket

* SAICI is an abbreviation of Sociedad Anonima de Inversiones Comerciales e Industriales.

No. 80-6005), which affirmed the judgment in favor of respondent-plaintiff United States of America, entered in the District Court of the Southern District of New York on motion of the Government because of the alleged failure of SAICI to complete discovery demanded by the Government. (Docket No. 71 Civ. 928-SDNY).

OPINION BELOW

The Court of Appeals affirmed summarily with an oral opinion at the bench.

The District Court in an unreported opinion struck the answer of SAICI, and directed a default judgment for the Government upon the ground that SAICI had not completed all

discovery demanded by the Government. In rejecting SAICI's argument that its New York State Court judgment established its right to the fund in question thereby created ($215,000, now $400,000), the District Court stated:

> "SAICI continues to argue that the State Court judgment against the Bosurgis is binding upon the United States and forecloses all discovery. In view of the holding by the Circuit Court, there is absolutely no basis to this argument."

The judgment and opinion of the New York State Supreme Court, Appellate Division, in favor of petitioner SAICI against the co-defendants Chemical Bank and Bosurgi brothers is reported at SAICI v. Bosurgi, 43 AD 2d 519, case no. 3 (1973).

During the pendency of the pre-trial proceedings, on the Government's

motion to strike the answer of SAICI and to enter a default judgment in favor of the Government because SAICI did not comply with all of the Government's demands for discovery, the United States Magistrate ruled that because of SAICI's sole reliance upon its New York State Court judgment, preclusion, rather than dismissal, was the appropriate sanction. The Magistrate held:

> "SAICI has always contended it will rely on the State Court judgment to establish its claim to the account, and has also maintained that the discovery in question had no relevancy for that reason. The discovery at issue was not directly related to the State Court judgment and, therefore, the striking of SAICI's answer may not be warranted. In my view an order of preclusion appears to be the appropriate sanction."

Earlier, this case was before the United States Court of Appeals on prior cross-appeals involving respective motions by SAICI and the Government for

summary judgment, both of which were denied. United States v. Bosurgi, 530 F 2d 1105. The District Court had granted summary judgment to SAICI, based upon its State Court judgment. United States v. Bosurgi, 389 F. Supp. 1088, 1090-1091 (SDNY, 1975). In that regard the District Court wrote:

> "This action is intimately related to two earlier lawsuits in New York State Courts involving the same parties (except for the United States).
>
> ***
>
> Although the United States was fully aware of the State Court proceedings and informally participated therein, it was not a formal party therein.
>
> ***
>
> In determining the proper regard to be given the State Court proceedings in this particular case, I note that the judgment entered was not a default judgment, but rather was entered on the basis of a motion for summary judgment.
>
> ***
>
> If the government seriously desires to suggest collusion, it must produce some evidence to that effect...It has failed to do so here...I conclude that the State Court proceedings were not collusive.
>
> ***

Thus, there is no reason not to give proper regard to the State Court proceedings herein. Indeed, since such interest as judicial economy are enhanced by allowing competent state tribunals to decide issues of state law (citation) I think that it is proper here to give considerable weight to the fact that the state court has found that SAICI is the owner of the funds in the Chemical Bank account.

***

While the government quibbles about the authenticity of the evidence before the state court, five members of the Appellate Division of the New York Supreme Court found it sufficient to order the state trial court to enter summary judgment on SAICI's behalf. I have already indicated that I feel that considerable regard should be given to the decisions of the state court in this case."

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1980 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Under Article 4, §1 of the United States Constitution, federal courts are

bound to give to judgments of state courts the same faith and credit that courts of one state must give to judgments of her sister states.

The due process clause of the Fifth Amendment to the United States Constitution is also involved, inasmuch as the Court of Appeals and the District Court deprived SAICI of the fruits of the State Court judgment without a trial or hearing to determine its validity, and force and effect.

STATEMENT OF THE CASE

In 1966, the Bosurgi brothers brought a common law action against the Chemical Bank in New York State Supreme Court, for fraud and misconduct involving wrongful security transactions. The complaint contained no reference to Adriana Bosurgi or her estate. In 1970 a proposed settlement by the Chemical Bank (but never consummated) brought into being the $215,000 fund (now $400,000) to which the Government lays claim for estate taxes asserted to be due because Adriana Bosurgi, allegedly "a non-resident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at the defendant, Chemical Bank." On March 2, 1971 the Government brought this federal lawsuit to reduce to judgment

four jeopardy assessments levied against her estate and to foreclose these tax liens on the settlement fund.

There were no funds or assets in existence when the Bosurgis' State Court suit was brought, nor was redress sought which involved Adriana Bosurgi or her estate, directly, indirectly or derivatively. In 1971, SAICI appeared on the scene and sought to intervene, claiming that it was the victim of the Bank's fraud. The intervention was successfully opposed by counsel for the Bosurgis, the Bank, the parties to the litigation, and by the Government counsel from the sidelines.

SAICI then brought an independent action in the New York State Supreme Court in 1971, and moved for consolidation of its action with the Bosurgi

lawsuit and for summary judgment, which was successfully opposed in like fashion and its application was denied. SAICI appealed. Prosecution of the appeal was delayed pending a conference with the United States Attorney in charge of the matter at the Appellate Division of the Internal Revenue Service, to whom copies of all papers submitted were sent at his request.

Government counsel in a three page letter dated September 14, 1973, wrote the State Appellate Court as "amicus to the court" urging that SAICI's appeal be rejected. The Appellate Division granted the Government leave to file an amicus brief, which the Government did not do. The Appellate Division reversed and granted SAICI's application for consolidation

and for summary judgment. SAICI v. Bosurgi, 43 AD 2d 519, case no. 3 [1973]. It is important to note that in granting summary judgment in favor of SAICI as to the settlement funds involved in the tort action against the Bank, the State Appellate Court expressly acknowledged that "the tax liens, if valid, are not affected" by such determination (SAICI, supra, p. 521). It was our claim that the Government's tax liens were not valid against SAICI, nor could they validly be asserted against the settlement fund inasmuch as the two state lawsuits brought respectively by the Bosurgi brothers and SAICI did not involve any claim by the Estate of Adriana Bosurgi against the Chemical Bank and in no way affected or compromised the ability of

the Government to proceed against the Chemical Bank with respect to any account maintained there by Adriana Bosurgi or for any wrongdoings involving her assets.

Yet, in the opinion last rendered by Judge DUFFY on November 7, 1978 in this federal lawsuit, it is stated:

> "The practical effect of this [the State Court Judgment] would be that Adriana Bosurgi was not the owner of the custody account at her death and, therefore it would not be included as part of her estate."

However, the Government in its brief on the very application on which the foregoing opinion was rendered asserted:

> "Plaintiff [U.S.] has never contended that the Bosurgis' state court action against the Chemical Bank pertained to the Custodian Account in the name of Adriana Bosurgi."

And the Government claimed:

> "More importantly, the source of the $215,000 fund is irrelevant to this tax collection action."

Indeed, in its brief to the Court below on the appeal which gives rise to this application, the Government acknowledged that:

> "SAICI is correct that the source of the fund is not relevant to the tax collection aspects of this case."

Yet, what the Government has accomplished here is the striking out of SAICI's pleading grounded on the validity of its New York State judgment; this, in order to seize the settlement funds that SAICI was and is entitled to receive thereunder. It was SAICI's claim that its right to the settlement fund was invulnerable and not subject to the Government's tax claims against the Estate of Adriana Bosurgi because its State Court judgment giving SAICI title thereto rendered in a contested litigated proceeding was entitled to

full faith and credit. The onerous discovery proceedings were a procedural gambit as will be demonstrated that resulted in an unconstitutional denial to SAICI of due process.

Counsel for the Bosurgis who rendered arduous services both here and abroad was instrumental in exposing the Bank's wrongdoings which resulted in the initial aborted settlement. Although recognizing the worth of his services SAICI successfully contended that it was not bound by his retainer with the Bosurgis. The New York State Appellate Division sustained that contention and directed a hearing at which Justice KAPELMAN before whom all proceedings were held took testimony on the issue as to the legal fees to be awarded and, as we pointed out below,

"literally forced the settlement as to fees that was placed upon the record."*

REASONS FOR GRANTING THE WRIT

The Government's theory is that it may rightfully ask a federal court to review the sufficiency of the evidence upon which the Appellate Division of the New York Supreme Court

* Justice KAPELMAN "was in a far better position to determine the reasonable compensation" for the services rendered in the State Court action by Mr. Ginsberg (cf. FRIENDLY, J. in Phillips, Nizer, etc. v. Rosenstiel, 490 F 2d 509, 518-19 [1973]) because of his personal knowledge of all aspects of the state lawsuit. The Court of Appeals rejected his determination, erroneously concluding that the parties "merely adopted a stipulation between SAICI and Ginsberg as to the amount of the fees" (see U.S. v. Bosurgi, 530 F 2d 1105, footnote 8, at p. 1113) and ruled that the Federal District Court "should determine whether the sum [awarded by Justice KAPELMAN] is reasonable compensation". SAICI's request to call Mr. Justice KAPELMAN as a witness to these facts was rejected. The disregard of the State Court judgment in this respect and the denial of the hearing requested likewise, we submit, constitute a denial of due process. The State Court judgment as to this issue was also entitled to full faith and credit.

granted summary judgment to SAICI, by virtue of which title to the $215,000 fund constituting the Bank's monies was vested in SAICI. Review of the judgment, it is respectfully submitted, could only have been sought by way of appeal to the New York Court of Appeals, either by the Bank or by the Bosurgis. We contend that our State Court judgment was invulnerable.

SAICI was under no duty to satisfy any other court as to the sufficiency and adequacy of its evidence, which the Appellate Division of the New York Supreme Court held sufficient to warrant the granting of summary judgment. SAICI is entitled to establish the integrity of its State Court judgment, not by any further demonstration as to the authenticity of its

documentary proof, but simply by a demonstration that the judgment was rendered in a contested lawsuit and was the result of procedural and substantive due process in the State Court. The constitutional posture of SAICI's position was accurately and succinctly set forth as follows:

> "[B]oth here and before Magistrate BERNIKOW, we have with meticulous care demonstrated that the sole controlling issue to be tried is the validity of SAICI's state court settlement judgment that we respectfully submit can be quickly and expeditiously determined. SAICI's motion for an immediate trial thereof should be granted so that this unduly prolonged litigation may be brought to an end.
>
> SAICI cannot be deprived of its constitutional right to have that issue heard and determined. SAICI's pleading may not be stricken in order to thwart its right to a trial of that issue by the procedural maneuvering resorted to by government counsel who obviously can vindicate any government tax claim it may have and can prove against Adriana's estate by proceeding against the bank whose alleged fraud and conversion can be shown to have resulted in the impairment or the obliteration of the assets in that account."

SAICI was formed in 1954. The Government

demanded, among other onerous requests, the following:

> "4. Identify every person who has served as an officer of SAICI since its incorporation or formation and for each such person, state his position, his duties, and the years he held such position.
>
> 5. Identify every person who was a stockholder or partner in SAICI during each year since its incorporation or formation and for each such person state the number of shares owned or the percentage of his interest."

SAICI's response was:

> "4. The formation of SAICI took place as follows:
>
> (a) W. Sanderson & Sons was an Italian company apparently engaged in the business of producing citrus by-products. It was an old company of well-known international reputation.
>
> (b) Sanderson & Sons, Italy, was determined to do business in Argentina, then under the control of the Peron Government, which was solicitous of industries established by foreigners.
>
> (c) However, the Italian Government prohibited removal of capital from Italy so it was necessary to obtain capital for the Argentinian business from other sources.
>
> (d) This was accomplished by the formation of SAICI. A group of anonymous businessmen formed SAICI in Uruguay for the purpose of supplying the capital for the

> construction of a plant in Argentina for Sanderson and for its initial working capital. In addition, SAICI provided working capital and funds whenever they were needed by Sanderson, Argentina, whose factory was set up at Concordia, Argentina.
>
> 5. We are unable to identify every person who was a stockholder or partner in SAICI during each year since its incorporation or formation because SAICI is a 'societa anonime' whose stock was in bearer form; the bearer appears at stockholders' meetings to vote, purely on the basis of possession of the shares of stock, which the holder exhibits in order to vote, without revealing whether the bearer is the true owner or a representative of the true owner; this, according to Prof. Avv. Domenico Barillaro, who has been acting as SAICI's representative, is the conventional form in which such securities were owned."

As pointed out by Joseph Borkin, former Chief of the Cartel Section in the Department of Justice, the purpose of the formation of a "Societa Anonime" evidently was to prevent disclosure of corporate interests which may result in a hostile Government and official seizure or penal sanctions.*

* The Crime and Punishment of I.G. Farben, MacMillan Publishing Co., 1978, p. 162.

SAICI's failure to respond to the voluminous Government interrogatories was neither wilful nor, as Magistrate BERNIKOW suggested, did it warrant the striking of its answer. At best, as he correctly observed, "[A]n order to preclude appears to be the appropriate sanction."

SAICI's State Court judgment is entitled to full faith and credit since it was an adjudication between SAICI and the Bank and had no reference to Adriana Bosurgi or her estate. The decision below is in conflict with this Court's determination in Commissioner v. Bosch, 387 U.S. 456, 457, 464 [1967], which requires that "proper regard" must be given to State Court judgments adjudicating property rights. Moreover, as Mr. Justice STEVENS recently reiterated:

> "It has long been the law that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.' Hampton v. McConnel, 3 Wheat. 234, 235 (Marshall, C.J.). See also Mills v. Duryee, 7 Cranch 481, 484 (Story, J.). This rule, if not compelled by the Full Faith and Credit Clause itself, see no. 18, infra, is surely required by 28 U.S.C. § 1738, which provides that the 'Acts, records and judicial proceedings... [of any State] shall have the same full faith and credit in every court within the United States... as they have by law or usage in the courts of [the] State... from which they are taken.'"*

The Bank could not and did not claim that the aborted settlement with the Bosurgi brothers or the succeeding judicial settlement with SAICI were induced by any fraud perpetrated by either upon the Bank, since such settlements were predicated upon the Bank's alleged wrongdoing. Yet, in its brief below the Government asserted:

---

* Thomas v. Washington Gaslight Company et al., 48 USLW 4930, 4933.

> "The Government's claim is of a fraud upon it in the collusive obtaining of the State Court judgment by the Bosurgis and SAICI."

Assuming, arguendo, there was such collusion in obtaining the State Court judgment, its impact and effect was solely upon the Bank, since it resulted in vesting title to the Bank's monies, i.e. the settlement of $215,000 in favor of SAICI. The Bank makes no such claim, nor can it. Indeed, it is well settled under New York law that a settlement "is final and is to be sustained by the Court without regard to the validity of the original claim." Yonkers Fur Dressing Co. v. Royal Ins. Co., 247 N.Y. 435, 444. The State Court judgment, insofar as the Bank is concerned, is therefore invulnerable and entitled to full faith and credit.

Moreover, SAICI's suit and the resulting settlement judgment does not

and did not prevent the Government from proceeding against the Bank in behalf of the estate, as alleged owner of the custodian account, in order to support and justify the Government's tax claims with respect thereto, since the estate of Adriana Bosurgi was not a party to the action, nor did the Bank demand or receive any release from liability to the estate.

The sole issue before the District Court and the Court of Appeals as well was whether the issues in the State Court litigation "have been fully and fairly litigated" as between SAICI and the Bank. Durfee v. Duke, 375 U.S. 106, 111. SAICI's readiness and request for immediate trial of that issue was unconstitutionally rejected.

Finally, this case calls for the

application of the doctrine of non-mutual collateral estoppel to prevent the Government from relitigating SAICI's right to the fund provided by the Bank in settlement of SAICI's State Court lawsuit, title to which was adjudged in SAICI by its State Court judgment, especially since as already noted, the Government had full opportunity to participate therein and rejected the New York State Appellate Division's invitation to submit a brief amicus to the Court. Although not formally a party, the Government undertook to exercise, so to speak, a "laboring oar". cf. Blonder-Tongue v. University Foundation, 402 U.S. 313 [1971], and Parklane Hosiery Co. v. Shore, 439 U.S. 322 [1979], recently considered by this Court in Standefer

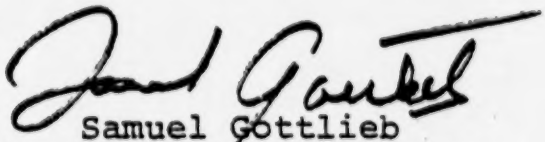
v. U.S. 48 USLW 4634, 4637. Here too, the "application of nonmutual collateral estoppel" would promote "judicial economy" and would conserve "private resources without unfairness to the litigant against whom estoppel was invoked", since SAICI's State Court judgment did not detrimentally affect or interfere with any claim, tax or otherwise, that the Government may have against Adriana Bosurgi, her estate, or against the Bank with respect to any funds or assets of Adriana Bosurgi or her estate.

CONCLUSION

The questions presented, which involve the striking of SAICI's pleading because of its alleged failure to comply with the Government's inordinate demand for discovery, and which resulted in the denial of full faith and credit to

SAICI's State Court judgment, viewed both from the procedural and substantive standpoints, are of sufficient constitutional magnitude to warrant review by this Court.

Respectfully submitted



Samuel Gottlieb
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and eighty.

Present: HON. WALTER R. MANSFIELD
Circuit Judge

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. DUDLEY B. BONSAL
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- v -

LEON BOSURGI AND EMILO BOSURGI, etc. et al.,

Defendant.

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by· Arthur Heller,
Deputy Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 8, 1973.

Present--Hon. Owen McGivern Justice Presiding
Arthur Markewich
Theodore H. Kupferman
Myles J. Lane
Aron Steuer Justices.

STATE COURT JUDGMENT

Sociedad Anonima de Inverniones Comerciales e Industriales

Plaintiff-Appellant-Respondent, Action No. 1

-against-

Leon Bosurgi and Emilio Bosurgi,

Defendants-Respondents,

-and-

Benedict Ginsberg,

Defendant-Respondent-Appellant.

Leone Bosurgi and Emilio Bosurgi,

Plaintiffs, Action No. 2

-against-

Chemical Bank New York Trust Company,

Defendant-Respondent.

Cross-appeals having been taken to this Court by the plaintiff-appellant-respondent and defendant-respondent-appellant from the order of the Supreme Court, New York County (Kapelman, J.), entered on August 22, 1972, denying without prejudice plaintiff's motion for an order of consolidation, or concurrent consideration and for summary judgment, and denying defendant Ginsberg's cross-motion for an order fixing his fee,

And said cross-appeals having been argued by Mr. Samuel Gottlieb of counsel for plaintiff-appellant-respondent, by Mr. Benedict Ginsberg, defendant-respondent-appellant, pro se, and by Mr. Andrew P. Adelman, of counsel for defendant-respondent; and due deliberation having been had thereof, and upon the memorandum decision of this court filed herein,

It is unanimously ordered that the order so appealed from insofar as it (1) denied plaintiff's motion be and the same hereby is reversed, on the law, and the motion granted, and (2) denied defendant Ginsberg's cross-motion be and the same hereby is modified, on the law and the facts, and the cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and disbursements.

ENTER

HYMAN W. GAMSO
Clerk